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IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

MICHAEL BENDER, et al.,

Petitioners,

—v.—

WILLIAMSPORT AREA SCHOOL DISTRICT, et al.,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF OF THE AMERICAN CIVIL LIBERTIES UNION, THE AMERICAN CIVIL LIBERTIES UNION OF PENNSYLVANIA, AND THE NATIONAL EDUCATION ASSOCIATION AS AMICI CURIAE IN SUPPORT OF APPELLEES

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QUESTION PRESENTED

Whether a public high school that permits a student religious club to meet during school hours, with the active participation of school personnel, violates the Establishment Clause of the United States Constitution, notwithstanding that other non-religious student clubs are permitted to meet as well.

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INTEREST OF AMICI[1/]

The American Civil Liberties Union ("ACLU") is a nationwide, nonpartisan organization of over 250,000 members dedicated to preserving and defending the principles embodied in the Bill of Rights. The ACLU of Pennsylvania is the Pennsylvania affiliate of the ACLU. The ACLU and its affiliates are committed to protecting both the individual freedom of worship and the principle of government neutrality in matters of religion embodied in the two Religion Clauses of the First Amendment. The ACLU and its affiliates have been involved either directly, or as amici, in many of the leading First Amendment Religion Clause cases in this Court and throughout the country.

[1/] The parties have consented to the filing of this brief, and their letters of consent have been filed with the Clerk of the Court pursuant to Supreme Court Rule 36.2.

The National Education Association ("NEA") is a nationwide employee organzation with a current membership of some 1.7 million members, the vast majority of whom are employed by public educational institutions. NEA has a strong interest in preserving religious freedom and maintaining the separation of church and state in public education.

STATEMENT OF THE CASE

Petitioner Michael Bender and a number of other students at the Williamsport Area High School brought this action challenging the school's decision denying them permission to establish a religious club. The club was to meet during regularly scheduled school hours.

The central facts[2/] necessary for the constitutional adjudication of the issues in this case are as follows:

(1) The club in question, "Petros," was unquestionably religious and admittedly established for the purposes of prayer and religious instruction.

(2) The regular schcol day began at 7:45 a.m., when all students were required to report to homeroom.

2/ The full factual record was described in detail by both of the courts below. See 741 F.2d 538, 541-44 (3d Cir. 1984), rev'g 563 F. Supp. 697, 700-701 (M.D. Pa. 1983).

(3) On Tuesdays and Thursdays, after the homeroom period, the school scheduled an "activity period," for one period (from approximately 8:00 to 8:30 a.m.). The activity period was a time for student club meetings.3/

(4) It was during this student activity period that Petros wanted to conduct its meetings. The club agreed not to use the bulletin boards, newspaper, or public address system to promote its meetings.

(5) According to school authorities, student clubs were governed by established school polices requiring that:

(a) A club is approved only if it will "contribute to the intellectual, physical or social development of the students and is otherwise considered legal and constitutionally proper." 741 F.2d at 543-44.

3/ A complete listing of active school clubs appears in the decision below. 74 F.2d at 543, n. 8.

(b) Each student club must have an adult advisor present in the room; the adult is usually a member of the faculty, or other school employee, but may also be a parent.

(c) Depending on the nature of the club, an adult advisor is selected with a "corresponding background." J.A. 144.

(d) Adult advisors are expected to "participate in the student group meetings or activities," and not merely to act as "monitors." J.A. 83.

(6) At least during the tenure of the present principal (serving since 1974), no proposed student club had ever been denied permission to meet.

The case was presented to the district court for decision on cross-motions for summary judgment, the parties concurring that there existed no genuine issues of material fact. Relying principally on this

Court's decision in Widmar v. Vincent, 454 U.S. 263 (1981), the district court held for the plaintiffs. 563 F. Supp. 697 (M.D. Pa. 1983).

An appeal of the district court decision was lodged by only one of the defendants, John Youngman, Jr. -- then a member of the Williamsport School Board, and respondent in this Court.[4/]

The Court of Appeals reversed the district court and concluded that under the circumstances of this case, even though other non-religious clubs were permitted to meet, to permit the in-school religious activity in question would violate the Establishment Clause. 741 F.2d 538 (3d Cir. 1984).

4/ All of the other defendants, including the Williamsport Area School District, declined to appeal and therefore did not appear as parties in the Court of Appeals and have not entered appearances in this Court.

After the Third Circuit decision, but prior to the grant of certiorari by this Court, Congress enacted the Equal Access Act, 20 U.S.C. §4071.[5/] That statute, like

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5/ Because of that intervering enactment of the Equal Access Act, this Court would be jurisprudentially well advised to vacate the writ of certiorari and remand the case to the district court for reconsideration of the school district's handling of requests such as Bender's in light of the new statute.

It is now well accepted that prudence requires a court to decide all statutory questions first, before reaching an ultimate constitutional inquiry. Ashwander v. Tennessee Valley Authority, 297 U.S. 288, 347 (1936) (Brandeis, concurring in part); Lowe v. SEC, 53 U.S.L.W. 4705, 4707 (June 10, 1985).

Similarly, logic suggests that prudential considerations warrant avoiding a thorny constitutional decision when an intervening statute may resolve the issue on narrower grounds. Indeed, this Court has specifically so held in Escambia County v. McMillan, 466 U.S. ____ (1984). There the Court remanded a voting rights case that had been decided on constitutional grounds for reconsideration in light of subsequently enacted amendments to the Voting Rights Act.

Remand would be particularly advisable in a case such as this, where Congress has gone to great lengths to address a difficult practical,
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this case, pertains to the use of school facilities by religious, as well as other student groups, in the context of what the statute defines as a "limited open forum." However, because it was enacted after the decisions below, the Equal Access Act is not applicable in this case.

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as well as legal issue. On remand, the school district may reconsider its position in light of the Equal Access Act and, assuming a case or controversy remains, the district court will have the opportunity to construe and apply the statutory provisions. For example, by its terms the statute applies only to student meetings occurring during "non-instructional time," 20 U.S.C. § 4071. But the meaning of that provision, and its applicability in the circumstances of this case, is not at all certain. Moreover, in the context of remand proceedings, the courts will be able to analyze the legislative history of the Equal Access Act and assess its significance in the resolution of this controversy -- a task that should not be undertaken by the Supreme Court in the first instance.

Such a remand is particularly advisable where, as here, this Court will otherwise have to resolve asserted claims under three different constitutional provisions -- the Establishment, Free Exercise and Free Speech Clauses -- all allegedly in conflict.

SUMMARY OF ARGUMENT

In an unbroken line of decisions extending over the last 25 years this Court has consistently rejected the tenacious efforts of those who would interject religion into the public school curriculum. Bender is the natural extension of that precedent: this case, too, is about religious activities in the public schools, and about the constitutionality of government acts that facilitate and endorse such in-school religious activities. In this case, as in McCollum v. Board of Education, 333 U.S. 203 (1948), those government acts include permitting the religious use of school facilities, during compulsory school hours, under the aegis of school authority.

Clearly, if the student religious club in this case were the only group that the public school permitted to meet, the courts

in this case were the only group that the public school permitted to meet, the courts would have little difficulty concluding that such school policy had, at least, the effect of advancing religion and therefore violated the Establishment Clause -- notwithstanding student assertions of free speech and free exercise rights. The central question presented by this case, then, is whether that religious effect of permitting religious practices in the public schools is reduced below constitutionally offensive levels solely because the school authorizes other non-religious student groups to meet as well. Simply stated, the issue is whether the rationale of Widmar v. Vincent, 454 U.S. 263 (1981) -- in which a university was required to make school facilities available to university students for religious purposes after school hours -- ought apply to a public school where much younger

students want to make religious use of public school facilities, with the active involvement of school personnel, during the school day. We think not.

As this Court has recognized in every case raising the issue -- extending without exception back to Engel v. Vitale, 370 U.S. 421 (1962) -- the scrupulous separation of church and state is nowhere more important, and has been nowhere more vigorously enforced, than in our nation's public schools. And the reasons this Court has applied that strict scrutiny in the public school context -- the impressionability of young children, the compulsory attendance laws that make them a captive audience, the historical impulse to inculcate majoritarian religious values in children, the strong parental interest in religious education and the role of the public schools as exemplars of our democratic ideals -- serve as well to dis-

tinguish public grade and secondary schools from the public university. Thus, it is precisely those differences that compel the conclusion that in the public schools, even when other groups are permitted to meet for non-religious purposes, student religious practices must be prohibited as a violation of the Establishment Clause.

ARGUMENT

A PUBLIC HIGH SCHOOL THAT PERMITS A STUDENT RELIGIOUS CLUB TO MEET DURING SCHOOL HOURS, WITH THE ACTIVE PARTICIPATION OF SCHOOL PERSONNEL, VIOLATES THE ESTABLISHMENT CLAUSE NOTWITHSTANDING THAT OTHER NON-RELIGIOUS STUDENT CLUBS ARE PERMITTED TO MEET AS WELL.

The precedential framework for the resolution of this case is Widmar v. Vincent, supra. The Court there adopted the following analytic syllogism:

> 1. If a school has created an open forum, then it cannot exclude religious speakers, unless there is a compelling reason to do so.[6/]

6/ This Court's decisions establish beyond question that in the absence of an open forum, the Establishment Cluase not only permits, but requires, that a school exclude religious speech. See e.g., McCollum v. Board of Education, supra, Engel v. Vitale, 370 U.S. 421 (1962), Abington School District v. Schempp, 374 U.S. 203 (1963), Stone v. Graham, 449 U.S. 39 (1980).

2.The school's need to comply with the Establishment Clause would provide such a compelling justification.

3.Therefore, if the religious speech in question would occasion an Establishment Clause violation, then that religious speech must necessarily be prohibited.

In this case, unlike Widmar, even if it is assumed that an open forum existed for student clubs,[7/] the public school student

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7/ Both courts below concluded that the school had created an open forum for student groups; that is, a limited open forum. See Perry Education Assn. v. Perry Local Educators' Assn., 460 U.S. 37 (1983). For purposes of this brief, amici accept that conclusion to be so.

It appears, however, that the Respondent and other amici (see e.g., Br. of Kiwanis International and Key Club International as Amici Curiae) disagree. And the record in this case -- which consists only of submissions filed in connection with cross motions for summary judgment -- does appear to be painfully short of the facts needed to answer definatively such

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religious use in question would have the effect of advancing religion to a degree prohibited by the Establishment Clause. Therefore, despite that otherwise open forum, the religious use is not constitutionally permissible.

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questions as: would the school permit all student groups, including the most controversial, to meet during the activity period?, was Petros denied the opportunity to meet for any reason other than Establishment Clause concerns?, etc.

Whatever the merits of that factual dispute as to the existence of a limited open forum in this case, it is essential to note that as a legal matter the existence of an open forum is a necessary prerequisite to permitting any religious use at all. If there is no open forum -- that is, if some (or all) secular groups are not allowed to meet -- then to permit the religious use would constitute a special benefit to religion that would clearly violate the Establishment Clause under well established precedent. McCollum v. Board of Education, supra. The history, logic and specific terms of the Equal Access Act recognize this principle by providing for "equal access" only when there exists a "limited open forum." 20 U.S.C. § 4071, et seq.

A. RELIGIOUS SPEECH IS CONSTITUTIONALLY DISTINGUISHABLE FROM ALL OTHER SPEECH.

Although religious speech is certainly protected by the Free Speech Clause of the First Amendment, Widmar v. Vincent, supra, Heffron v. International Society for Krishna Consciousness, 452 U.S. 640 (1981), it does not follow that all religious speech is constitutionally indistinguishable from other expression. Indeed, the First Amendment itself defines a content-based distinction between religious speech and other speech: only religious speech can -- depending on the status of the speaker, or the circumstances of the speech -- become so imbued with the authority of the government that it may be prohibited by operation of the Establishment Clause.

For example, when a teacher stands up in front of the class and reads the Bible, that is religious speech; but it is

constitutionally prohibited because the teacher is acting with the authority of the state. Abington School District v. Schempp, supra. And when children go off to private religious instruction in a public school classroom, that is religious speech; but the constitution requires that it be barred because the school's involvement unconstitutionally promotes religious education. McCollum v. Board of Education, supra. And when posters reciting the Ten Commandments are printed and purchased with private money, and displayed in public school classrooms, that is religious speech; but the Establishment Clause commands nonetheless that the religious speech be removed from the wall -- even though the Declaration of Independence may well remain -- because such official government support for religion may not be countenanced. Stone v. Graham, supra.

The Petitioner's mistakenly contend, Pet. Br., at 18-21, that since they are not government employees, their speech is private and the Establishment Clause does not apply. However, this case is not about whether their speech is itself, standing alone, a violation of the Establishment Clause; but rather whether the government acts facilitating that speech -- making the school rooms available, during hours of compulsory attendance and under the guidance of a school appointed adult supervisor -- have a sufficiently significant religious purpose or effect. If so, it is those government acts that are unconstitutional. Thus, the religious speech itself in McCollum v. Board of Education was entirely private -- the students engaged in their own private religious exercises under the supervision of private religious instructors. But the government was properly

held to have violated the Establishment Clause for permitting that private religious speech in public school classrooms during school hours and with school endorsement. See also Stone v. Graham, supra.

That Establishment Clause distinction between religious and other speech -- which permits, indeed compels, a "discrimination" against religious speech when its religious purpose or effect is attributable to the government -- reflects the profound political and social wisdom of the Framers. The Establishment Clause gives voice to their understanding of the unique role of religion as, on the one hand, an abiding strength of our private lives, and yet at the same time a potentially devisive instability in our collective governmental system:

- historically, religion has proven to be a singularly powerful motivating force, and therefore religious differences engender the most intense societal conflicts;

- religious, unlike secular beliefs, rest on faith, not reason -- they are therefore, less amenable to the give-and-take compromises that are essential for the functioning of the body politic;

- conversely, the majoritarian, secular powers of government threaten to overwhelm and trivialize the religious diversity that we hold so dear as a people.

Therefore, the critical inquiry in this case, as in any Establishment Clause case, is not whether religious speech is involved -- religious speech is always involved in an Establishment Clause case;[8/] but rather whether the context of the religious speech implicates the government in such a way as to trigger the prohibitions of the Establishment Clause. In this case, amici sub-

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8/ Of course, "religious speech" is used here to include the communicative significance of religious symbols, as well as words. Cf. Tinker v. Des Moines Indep. Community School District, 393 U.S. 503 (1969).

mits that it does, because of the special attributes of the public schools and their especially close relationships to, and control over, public school students.

B. FOR A PUBLIC SCHOOL TO PERMIT THE RELIGIOUS ACTIVITIES IN THIS CASE WOULD HAVE THE EFFECT OF ADVANCING, AND CONVEYING A MESSAGE OF ENDORSEMENT OF, RELIGION.

As recently re-emphasized in Wallace v. Jaffree, ___ U.S. ___ (1985), the three-part test articulated in Lemon v. Kurtzman, 403 U.S. 602 (1971) remains the appropriate standard for assessing an Establishment Clause claim. Of particular importance in this case is the second, "effects" test,9/

9/ There is no suggestion that the school had a religious purpose in creating the activity period or in refusing Petros permission to meet. See 741 F.2d 538, 551. However, the circumstances of this case do show impermissible "entanglement," in that by authorizing the religious club the school must necessarily become involved on a continuing basis in monitoring, supervising and participating in

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which provides that a government act is unconstitutional if "its principal or primary effect [is] one that neither advances nor prohibits religion." Id., at 613.

That Establishment Clause analysis has been significantly amplified by Justice O'Connor in her concurring opinions in Lynch v. Donnelly, ____ U.S. ____ (1984), and in Wallace v. Jaffree, supra. Her formulation maintains the underlying Lemon-test inquiry, but would focus on the issue of government endorsement of religion and, particularly as to the effects test, "whether the [government act] actually conveys a message of endorsement" of religion. Id., at ___ (concurring opinion).

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its activities and censoring its public announcements. See 741 F.2d at 555-57. Since "entanglement" is alone sufficient for a finding of unconstitutionality, the Court of Appeals decision should be affirmed on this ground independent of other considerations.

Regardless of the standard applied, however, for a public school to permit religious meetings in school facilities during school hours and under the direction of school personnel will involve the government in advancing religion -- and will certainly have the effect of conveying a message of government endorsement of religion -- by (i) providing government benefits to religion, as well as (ii) seeming to affix the imprimatur of state approval on those religious activities. Therefore, because of the resulting religious effect -- that clear message of endorsement -- the school may not constitutionally allow the Petitioners' religious use.

1. The Benefit to Relgion

This Court has already analyzed the benefits that flow to religion in circumstances closely analogous to this case. McCollum v. Board of Education, supra. There, too, private religious practices were permitted in the school during school hours. In that case, students were under the immediate supervision of private clergy, but were nonetheless subject to the ultimate authority of the goverment. In Bender, the benefit to religion is even greater than in McCollum because, in addition to in-school religious practice during school hours under school authority, here the supervisor was school appointed and participated in the student activities as a matter of school policy.10/ Thus the student religious ac-

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10/ Apparently, Petros was allowed to meet once and, at that meeting, a teacher monitored, "but took no part in the meeting." Pet. Br., at
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tivities in McCollum and Bender would both substantially benefit from governmental aid in two general respects: (i) they would both draw their participants from an audience compelled to be present in the school by operation of State law; and (ii) they would both receive free use of tax supported government facilities and personnel.

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4. However, despite that limited ad hoc experience, the record establishes that school policy requires the selection of supervisors having a "corresponding background" with the interests of the students, J.A. 144, and that the supervisors must actually "participate in the student group meetings or activities," rather than merely act as monitors. J.A. 83. As applied to the religious clubs, this policy means that teachers, who share the students religious beliefs, will actually participate with them in their religious practices. There is no indication in the record that students have the power to waive these requirements of school policy, notwithstanding an apparant desire to do so.

That active religious involvement of school personnel will not only provide a benefit to religion, but will bolster the sense that the school has endorsed those relgious practices with the imprimatur of its authority; see discussion infra.

Perhaps the most important benefit to religion that the Court found objectionable in McCollum was that "[t]he operation of the State's compulsory education system . . . assists and is integrated with the program of religious instruction carried on by separate religious sects." Id., at 209. The Court of Appeals below recognized that the same benefit would accrue to Petros, if it were allowed to meet. 741 F.2d at 553. And that is so even though the students at the Williamsport Area High School could choose not to attend the religious activities; so could the students in McCollum. The fact remains that a discrete captive audience -- school children in attendance in school at government compulsion -- was available for solicitation by religious adherents to participate in their religious activities. It is the access to that audience, rather than the success of the message, that constitutes the government benefit to religion.

Similarly, the McCollum Court found that the "integration of the tax-established and tax-supported public school system to aid religious groups to spread their faith," id., at 210, provided an improper benefit to religion as well. Such free use of tax supported facilities offended the long-established proposition that "[n]o tax large or small, can be levied to support any religious activities or institutions . . . whatever form they may adopt to teach or practice religion." Everson v. Board of Education, 330 U.S. 1, 16 (1947). Similar improper benefits to religion would be accorded to the Petitioners in this case if their religious practices were permitted: they would recieve the free use of facilities, including utilities, supported entirely by public tax revenues, and they would receive the benefits of school-employed supervisors for their religious activities. To provide

all of these benefits to religion implicates the government in the advancement of religion to a degree prohibited by the Establishment Clause.

Finally, for purposes of assessing the benefit to religion, the fact that other, non-religious clubs are allowed to meet is essentially irrelevant.[11/] If, for example, the religious club were alone allowed to meet with any student voluntarily desiring to join, the benefits to religion would be precisely the same as in this case. The benefits accorded the non-religious clubs are not in derogation of, but in addition to, the benefits to religion.

11/ It might more logically be argued that the existence of the other clubs lessen the imprimatur of state endorsement. However, as demonstrated infra, even that argument is without merit because it depends on an unrealistic appraisal of the nature of public high schools and their students.

2. Imprimatur of State Endorsement

The Supreme Court in Widmar v. Vincent, supra, recognized that an "imprimatur of State approval on religious sects or practices" would confer an unconstitutional governmental benefit on religion. Id., at 274. See also the decision below, 741 F.2d at 555, and Brandon v. Board of Education, 635 F.2d 971, 978 (2d Cir. 1980). Of course, in Widmar the Court concluded that such an impermissible imprimatur did not attach. There are many reasons why that conclusion ought be different in the context of the public schools.

First, as the Court itself recognized in Widmar, university students "are less impressionable than younger students and should be able to appreciate that the University's policy is one of neutrality toward religion." Id., at 450, n. 14. The concern about "impressionability" is particularly

important in the public school setting, not only because the students lack the maturity of adults but also school officials tend to exercise a pervasive influence on the life of the child while in school. And it is that combination of a relatively immature and suggestible student body, in a highly structured school environment controlled in virtually every respect by the State, that suggests public school students may reasonably be unable to distinguish active school endorsement of religious activities from mere neutral indifference.

Second, in assessing the extent to which the school appears to be endorsing religion, one must look not only at a few of the most mature senior students[12] but the

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12/ Petitioners attempt to refute the "impressionability" claim by relying on the Congressional testimony -- taken during hearings on the Equal Access Act -- from a very small number of high school students, including

(footnote continued)

full range of the student body including the less sophisticated children as young as 13 in the lower high-school grades (and of course younger still in the grade schools), as well as those students holding minority religious beliefs. A young student, or a student of a faith without many adherents at the school is likely to see school endorsement of religion

- in the religious use of school classrooms, which these students must then attend immediately thereafter for other regular school purposes;

- in the presence and participation of school employees -- perhaps their own teacher -- in the religious activities of a religious club;

- in the very fact of school approval of the club and its religious practices.

Lisa Bender who was a senior at the time and seemingly quite mature. Pet. Br., at 34. Obviously though, Establishment Clause concerns do not focus only those handful of high school students with the sophistication to testify in Congress as to their own maturity.

Like all of our civil liberties, the protections of the Establishment Clause must be measured with special sensitivity for the perspective of the minorities -- whether they be youthful students, or adherents of minority religious views -- who are intended as principal beneficiaries of the Bill of Rights. And when viewed in that light, it becomes evident that a public school cannot permit the religious use of its facilities, in the circumstances of this case, without reasonably appearing -- to a significant segment of the general public school student body -- as endorsing the religious practices involved.

Finally, in attempting to prove that public school students are not too impressionable, the Petitioners refer to court decisions that:

> "consistently have recognized high school students' ability to hear controversial views without perceiving school endorsement, whether expressed

> by students in school newspapers, school assemblies, or student groups, by teacher in the classroom or by materials in the school curriculum." Pet. Br., at 30-31.

However, the Petitioners' argument is flawed in a number of important respects.

For one, it entirely misses the point of the Establishment Clause: the government is only prohibited from endorsing religion, or religious views. Therefore, political speech may be allowed even if some students might mistakenly attribute it to the government because, even if they were correct, the Constitution would not be violated. It is only when the government is perceived as advancing religious speech that the Establishment Clause prohibitions may be offended.

Furthermore, even if it were true that children can be exposed to controversial political speech "without perceiving school endorsement," id., it is not at all clear

the same is true of religious speech. A student usually learns from countless different sources -- from textbooks, assembly programs, school projects and directly from the teachers themselves -- that school authorities are generally committed to mainstream American political values. So that when students hear -- for example, at a school assembly -- a controversial speaker of the right or the left, there is very little chance that they will confuse those views with the school's, since they know the school's views so well. The same cannot be said of religious speech: precisely because the schools do not generally teach religion, when religious activities are interjected into the school curriculum they are especially prominent, and reasonably likely to be perceived as having the endorsement of the school.

In this case, the students at Williamsport Area High School were afforded an "activity period" for a total of two in-school periods a week. Prior to the events in this case, the clubs that were approved were all essentially innocuous -- clubs such as Peer Helpers, Future Homemakers of America, Band and the Spanish Club are not the sort to engender any principled committment of their members, nor were they likely to provoke any strong passionate reaction of the non-members.[13/] And the subject matter of all of

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13/ This case does not raise the issue of whether the school could intentionally preclude controversial political and social student activities, quite apart from the religious activities at issue here. See Tinker v. Des Moines Independent School District, 393 U.S. 505 (1969). And amici does not, therefore, address that issue.

However the uniformly non-controversial nature of the authorized clubs prior to Petros does raise a question about whether a legitimate open forum existed at the school. As explained above, see n. 6, if a true open forum for all other student clubs did not exist, then a
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those clubs is entirely consistent with those mainstream educational values that the students know are, in fact, endorsed by the school.

Into that rather homogenous mix, the Petitioners want to add Petros -- a religious club. As a result, Petros will undoubtedly be seen by many as "acceptable" to the school's values, in the same way that all of the other clubs are. And that imprimatur of school approval will be enhanced by the very fact that Petros is different than the other clubs: it will receive more attention, it will be more controversial, it will undoubtedly engender the opposition of some students and teachers who feel at odds with its religious message, and the school will therefore have to establish a more

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religious student club could certainly not be permitted to meet. Widmar v. Vincent, supra; McCollum v. Board of Education.

involved presence in order to maintain the non-disruptive functioning of this one club.[14] In practical effect, the message of school endorsement will be certain and clear.

Of course, the strong personal feelings that give rise to the Petitioners' interest in religion is nothing but admirable. However, they have more than enough opportunity to give expression to those feelings outside the school setting, and the only question here is whether their in-school religious practices are constitutionally permissible.[15]

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[14] Of course, the Establishment Clause was enacted for the very purpose of preventing just such divisiveness and religious disputes in the public sector. See e.g. Engel v. Vitale, supra.

[15] The District Court below concluded that the Petitioners' asserted Free Exercise claim was entirely without merit in the context of this
(footnote continued)

In the circumstances of this case, the student religious use in question would have the government significantly benefit and advance religion, and would have the effect of signalling that the government endorsed the students' religious views and practices. Therefore, the Establishment Clause prohibits those in-school, religious meetings, and they may not be allowed notwithstanding that other, non-religious clubs are allowed to meet. Widmar v. Vincent, supra.

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case. 563 F. Supp. at 701. Those claims were not seriously pursued by Petitioners thereafter.

Petitioners have, however, attempted to articulate an "accomodation" argument. Pet. Br. at 45. This argument should be summarily rejected because the government has not burdened any of their rights that need accomodating. See, Wallace v. Jaffree, supra at ___, n. 45. Moreover, even if such a burden existed, it arises solely as a result of the government's obligation to abide by the Establishment Clause. And as Justice O'Connor recently observed in rejecting an "accomodation" argument: ". . . it is beyond the authority of the State . . . to remove burdens imposed by the Constitution itself." Id., at ___ (concurring opinion).

CONCLUSION

For all the foregoing reasons, the Third Circuit decision should be affirmed.

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Respectfully submitted,

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